

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

September 9, 2009 Session

**CHARLES G. SUMMERS v. STATE OF TENNESSEE,
JAMES FORTNER, WARDEN**

**Direct Appeal from the Circuit Court for Hickman County
No. 07-5020C Timothy L. Easter, Judge**

No. M2009-00443-CCA-R3-HC - Filed February 18, 2010

The petitioner, Charles G. Summers, filed a petition for writ of habeas corpus relief. The habeas corpus court found that the petitioner's escape conviction was void and remanded the case for resolution of that conviction. The petitioner appeals the habeas corpus court's failure to set aside his entire plea agreement. Following a review of the record, the parties' briefs, and applicable law, we affirm the habeas court's judgment and remand the case for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court, Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

Michael T. Fort, Franklin, Tennessee, for the appellant, Charles G. Summers.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; and T. Michael Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural Background

The petitioner appeals the habeas corpus court's finding that the facially void portion of his plea agreement did not render the entire plea agreement void. The following is the procedural history of this case as recited by this court in a previous decision in this matter:

The petitioner, Charles G. Summers, was charged in the Giles County Circuit Court with first degree murder, aggravated arson, sale of cocaine, and felony escape. On October 25, 1991, judgments were entered on all four charges. On the first degree murder charge, Summers pleaded *nolo contendere* to the amended charge of voluntary manslaughter and received a six-year sentence. Summers pleaded guilty to the charges of aggravated arson and the sale of cocaine, and the trial court imposed sentences of twenty-three years and eleven years, respectively. Finally, Summers pleaded guilty to the amended charge of misdemeanor escape, for which he received a sentence of eleven months and twenty-nine days. The three felony sentences were ordered to run consecutively to each other for an effective sentence of forty years. The misdemeanor escape sentence was ordered to run concurrently with the felony sentences.

Almost thirteen years later, on September 24, 2004, Summers filed a pro se habeas corpus petition in the Hickman County Circuit Court, alleging that he was being held for the other charges when he escaped and that the trial court therefore lacked jurisdiction to order the escape sentence to be served concurrently with the other sentences. Summers attached all four Giles County judgments to his habeas corpus petition, but he did not include any part of the record of the proceedings upon which the judgments were rendered. No offense date is indicated on any of the four judgments. The trial court dismissed Summers' habeas corpus petition without appointing counsel or holding a hearing.

The Court of Criminal Appeals reversed the summary dismissal and remanded the case to the Hickman County Circuit Court for the appointment of counsel if Summers was indigent and for a determination of whether Summers was being held for the other charges when he escaped.

Finding that "the escape judgment is facially valid and Summers failed to support his factual assertions with pertinent documents from the record of the underlying proceedings," the supreme court reversed the court of criminal appeals and affirmed the summary dismissal of the petition. The court specifically found that because "the judgment is silent as to whether Summers committed the escape while being held for the other charges," no sentencing illegality was apparent from the face of the portion of the record attached to the petition.

After the supreme court's ruling, the petitioner filed another petition for writ of habeas corpus. This time, in addition to attaching the pertinent judgment forms, the petitioner attached the indictment for felony escape which states that the petitioner "did unlawfully escape from Giles County Jail located in Giles County, Tennessee, having been held there due to a charge of First Degree Murder and Aggravated Arson." The State filed a motion to dismiss the petition, alleging that although the petitioner had established that his sentence was illegal, he was not entitled to habeas corpus relief because he had failed to establish that the illegal sentence was "a material element of his plea agreement." The trial court granted the State's motion and summarily dismissed the petition.

Summers v. Fortner, 267 S.W.3d 1, 1-3 (Tenn. Crim. App. 2008) (citations omitted).

The petitioner appealed the habeas court's decision to this court and argued that his sentence for escape was illegal because the trial court ordered him to serve it concurrently with his voluntary manslaughter and aggravated arson sentences in direct contravention of Tennessee Code Annotated section 39-16-605(c) and Tennessee Rule of Criminal Procedure 32(c)(3)(B). This court concluded that the petitioner established that his sentence for misdemeanor escape was in direct contravention of a statute, and was thus illegal and void. *Id.* at 4. This court further concluded that instead of summarily dismissing the petition, "the habeas corpus court should have appointed counsel and held an evidentiary hearing to determine whether the illegal sentence was a material element of [the petitioner's] plea agreement with the [s]tate." *Id.* at 7. This court remanded the case to the habeas corpus court for the appointment of counsel and a hearing to determine whether to allow the petitioner to withdraw his guilty plea.

Following this court's directive, the habeas corpus court held an evidentiary hearing on January 29, 2009. The court strictly limited the proof to the face of the judgment and the record of the proceedings underlying the judgment. After considering the proof, the habeas corpus court found that the petitioner's misdemeanor escape conviction was an illegal sentence. The court further found that the petitioner's plea agreement was composed of several components, and the "misdemeanor escape plea and sentencing agreement component was not a material part of the plea agreement." Accordingly, the court found that only the portion of the plea agreement concerning the escape conviction was void and granted habeas corpus relief as to that conviction only. The petitioner timely appealed.

Analysis

On appeal, the petitioner argues that the trial court erred in finding that the void portion of his sentence was not a material element of his plea agreement, and therefore, did not render the entire plea agreement void. The petitioner argues that the void portion of his sentence was a material element because he waived his constitutional rights and did not persist in a plea of not guilty and force the state to prove every element of every offense beyond a reasonable doubt. The state asserts that the escape sentence was not a material part of the plea agreement because the petitioner's primary motive for entering the plea agreement was to avoid conviction of and sentencing for first degree murder.

On appeal, this court is limited to considering the face of the judgment and the record of the proceedings upon which the trial court rendered the judgment. *Smith v. Lewis*, 202 S.W.3d 124, 128 (Tenn. 2006). The determinative issue when deciding whether an illegal sentence invalidates a guilty plea and the resulting conviction is "whether the plea agreement included an illegal sentence as a material element." *Summers v. State*, 212 S.W.3d 251, 259 (Tenn. 2007). "[M]ateriality exists when 'there is a reasonable probability' of a change in the outcome of the proceeding." *Fortner*, 267 S.W.3d at 8 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). If the illegal portion of the sentence was not a material element of the plea agreement, then "the illegality infects only the sentence, only the sentence is rendered void and habeas corpus relief may be granted to the extent of the sentence only. In such cases, the underlying conviction remains intact," and a remand for correction of the sentence is appropriate. *Smith*, 202 S.W.3d at 130.

To determine whether the escape sentence was a material part of the plea agreement, we must examine the record. "In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions." *Summers*, 212 S.W.3d. at 261. The record before us does not contain a recording or a transcript of the proceedings upon which the trial court entered the judgments. However, it appears from what is in the record that the escape sentence being served concurrent with the other sentences was not a material part of the plea agreement. The petitioner was facing first degree murder, aggravated arson, and sale of cocaine charges in addition to the escape charge. The petitioner agreed to plead guilty to aggravated arson, sale of cocaine, and misdemeanor escape. The petitioner agreed to plead *nolo contendere* to voluntary manslaughter and receive a sentence of six years instead of facing first degree murder charges and a possible life sentence. The record here does not prove, on its face, that the illegal provision of a concurrent sentence for misdemeanor escape was a bargained-for element of the petitioner's plea. Therefore, we conclude that the petitioner has not proven that the sentence for his escape charge was "bargained-for" or a "material element" of the guilty plea. As such, the petitioner's sentence is void, but the conviction remains intact. *See Fortner*, 267 S.W.3d at 7; *Smith*, 202 S.W.3d at 130.

Conclusion

Based on the foregoing reasoning and authority, we affirm the judgment of the habeas court and remand the case for further proceedings consistent with this opinion.

J.C. McLIN, JUDGE